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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ARTHUR HENRY BRADY,

Defendant and Appellant.

B298621

(Los Angeles County  
Super. Ct. No. BA459122)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Kennedy, Judge. Affirmed.

Justin Behraves, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Steven D. Matthews and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

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Arthur Henry Brady appeals from a judgment entered after the jury convicted him of voluntary manslaughter. Brady contends on appeal the prosecutor committed prejudicial misconduct by arguing in her closing argument that Brady did not reasonably act in self-defense because this was a situation where he was “essentially . . . bringing a knife to a fist fight.” We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *A. The Prosecution Case*

In the late evening of July 4, 2017 Brady, his girlfriend Candace Benton, Benton’s adult daughter Candace Sims, and another man arrived at Sims’s apartment complex on East 36th Street in Los Angeles. At the time Brandon Terry was hosting a family barbecue at the same apartment complex. Alonzo Horowitz, Alonzo’s brother Alex,<sup>1</sup> Alex’s girlfriend Savannah Vergo, Alonzo’s cousin Rasheed Scott, and others were at the barbecue. When Brady and his group arrived, a confrontation ensued. Benton and Sims were looking to fight another woman they believed was at Terry’s barbecue. They “were angry and loud . . . . They were banging on the doors in the complex, and they were yelling, telling the people inside to come out.” Brady had a knife clipped to his belt or pants pocket. The knife was seven or eight inches long, with a three-inch blade. Scott talked to Brady in an effort to deescalate the tension among the group. Brady responded he did not want anyone to disrespect his wife and daughter (Benton and Sims).

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<sup>1</sup> Because Alonzo and Alex Horowitz share a last name, we refer to them by their first names to avoid confusion.

Four or five women came outside from Terry's apartment and told Benton and Sims the woman they were looking for was not there. But the woman Benton and Sims were looking for exited from another apartment door, and a fight broke out among the women. Alex, Alonzo, and Scott tried to separate the women. At this point Brady walked up, "aggressively looking like he was trying to start something." One of the women was on top of Benton, "pounding her," and Brady responded by kicking the woman in the face. Alonzo reacted by punching Brady in the jaw. Brady stumbled away into a bush.

According to Scott, Alex then tackled Brady, forcing him to the ground on his back. Alex was on top of Brady, "straddling" and punching him. Brady punched back. Alex and Brady continued to punch each other while they moved around on the ground, bumping into the grill and the bushes. The next thing Scott saw was Alex clutching his chest and bleeding, and then Alex fell over. The fight between Alex and Brady had lasted 45 to 60 seconds. No one who was fighting had a weapon other than Brady.<sup>2</sup>

Alex called out to Alonzo, and Alonzo realized Alex had been stabbed. Alonzo had not seen the stabbing. Alonzo ran up to Brady, and Brady swung his knife at Alonzo but missed. Alonzo saw the knife in Brady's hand and said, "What are you going to do with that small ass knife?"<sup>3</sup> Brady responded, "Come

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<sup>2</sup> The prosecutor played for the jury surveillance video showing the apartment complex on the evening of the fight, but the video only shows the initial fight, not the stabbing.

<sup>3</sup> Alonzo failed to return to court for the second part of his cross-examination, but defense counsel stipulated Alonzo's direct examination could stand.

on.” At this point Alonzo turned his attention to Alex, who was holding his chest and bleeding. Alex tried to sit up but fell back down. He stopped breathing and was taken to the hospital, where he died. Alonzo realized on his way to the hospital that he had also been stabbed on his left side and was bleeding. Alonzo received eight staples at the hospital for his stab wound.

Abner Mariano was outside his apartment in the same apartment complex when he heard screaming and arguing. He saw Brady come from the side of the apartment complex holding a knife in his hand. Brady appeared to be dizzy and confused and was stumbling as he walked. He was out of breath and leaned on his vehicle. Other people came from the same area and were yelling at each other. Brady got in his car and drove away.

At the time of the fight, Alex was almost 23 years old, five feet nine or 10 inches tall, and weighed 170 or 180 pounds. Vergo described him as “fit” and “really strong.” Alonzo was 27 years old, five feet seven inches tall, and weighed 175 pounds. Scott described Alonzo as “physically fit.” Brady was approximately 40 years older than Alex, “tall,” with a “robust body.”

According to the autopsy report, Alex suffered from blunt force trauma, two stab wounds, and lacerations to his fingers. The fatal stab wound punctured Alex’s heart.

#### B. *The Defense Case*

Benton’s sister Franette Tolon lived in an apartment complex about 60 blocks from where the fight occurred. On July 4, 2017 Brady, Benton, and Sims came to Tolon’s apartment for a family barbecue. That evening Brady, Benton, and Sims left with Tolon’s husband to go to Sims’s apartment. Tolon’s husband drove Brady back to Tolon’s home later that night. Brady was “beat up, bleeding from his face, his mouth, holding his rib cage.”

He was groaning and had blood coming from his mouth and from above his eye. Brady used a garden hose outside Tolon's apartment to clean himself off. According to Tolon, Brady then left to go to the hospital.<sup>4</sup>

C. *Closing Arguments*

During her closing argument, the prosecutor asserted, "Imperfect self-defense, essentially, is that . . . the defendant's belief that he had to use deadly force was unreasonable. And in this case, the defendant's belief was absolutely unreasonable. [¶] You don't get to claim self-defense if you are part of a chain of events that lead[s] to somebody physically assaulting you. You don't get to claim self-defense if you're part of a group of people who come into a situation that had been perfectly calm, instigate some type of confrontation, create the elements that start a fight, and then turn around and claim self-defense when deadly force is used. Nor can you use it when we have as here, somebody, the defendant, essentially, bringing a knife to a fist fight." Defense counsel objected, arguing this "[m]isstates the law." The trial court overruled the objection.

The prosecutor continued, "All of the testimony about what was happening in the fight between the [women] was that fists, kicks, et cetera. No weapons. Hair pulling. Whatever. A fight between females. [¶] The defendant introduces the knife into the situation. And so he escalates what was a fist fight to now a deadly confrontation. And he was unreasonable in doing so."

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<sup>4</sup> The trial court also took judicial notice of the fact Alonzo, who testified as to the events of the evening leading up to the fight between Brady and Alex, suffered six prior felony convictions.

The prosecutor argued further, “The defendant took out his knife because he was angry. It wasn’t because he was in fear of his life. And when the defendant took out his [knife], he intended to kill both of those young men. It wasn’t because he was trying to save himself from imminent harm or death.”

Defense counsel argued in her closing argument Brady was not an aggressor, and instead, he only got involved in the fight to protect his girlfriend who was getting beaten up. At that point it was Alonzo who hit Brady first by punching him in the jaw. Further, Brady’s use of deadly force was reasonable because Alex was 40 years younger and much stronger than Brady, had tackled Brady, and for 45 seconds was punching him with his fists. She argued, “This was not a heat-of-passion killing. This occurred because Mr. Brady truly believed that he was in danger when he was being beaten by people who had the ability to take his life with their fists. With the force that they can generate from beating him on the head while he’s on the ground if he didn’t defend himself.”

#### D. *The Verdicts and Sentencing*

The jury found Brady not guilty on count 1 of the second degree murder of Alex (Pen. Code, § 187, subd. (a)) and guilty of the lesser included offense of voluntary manslaughter (§ 192, subd. (a)). The jury also found true the special allegation Brady personally used a deadly and dangerous weapon (a knife). (§ 12022, subd. (b)(1).) The jury found Brady not guilty of the attempted murder or attempted voluntary manslaughter of Alonzo. (§§ 187, subd. (a), 192, subd. (a), 664.) The trial court sentenced Brady to the middle term of six years, plus one year for the weapon enhancement.

Brady timely appealed.

## DISCUSSION

### A. *Prosecutorial Misconduct*

“Advocates are given significant leeway in discussing the legal and factual merits of a case during argument.” (*People v. Centeno* (2014) 60 Cal.4th 659, 666 (*Centeno*); accord, *People v. Mendoza* (2007) 42 Cal.4th 686, 702 [“counsel have ‘broad discretion in discussing the legal and factual merits of a case’”].) However, ““it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements [citation].” [Citation.] Improper comments violate the federal Constitution when they constitute a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. [Citation.] Improper comments falling short of this test nevertheless constitute misconduct under state law if they involve use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.” (*People v. Bell* (2019) 7 Cal.5th 70, 111 (*Bell*); accord, *People v. Cortez* (2016) 63 Cal.4th 101, 130.)

“[W]hen attacking the prosecutor’s remarks to the jury, the defendant must show that, “[i]n the context of the whole argument and the instructions” [citation], there was “a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.”” (*Bell, supra*, 7 Cal.5th at p. 111 [prosecutor’s coin-toss analogy to explain reasonable doubt standard was “problematic,” but not misconduct because it was not reasonably likely the jury would have understood argument to mean they could decide case by

flipping a coin]; accord, *People v. Cortez*, *supra*, 63 Cal.4th at pp. 130-131 [prosecutor's statement in rebuttal argument that jury could find proof beyond a reasonable doubt if they looked at the evidence and concluded "[they knew] what happened, and [their] belief [was] not imaginary" did not constitute misconduct because there was no reasonable likelihood jurors understood argument to mean they could convict based on "nonimaginary" belief supported by preponderance of evidence or strong suspicion]; cf. *Centeno*, *supra*, 60 Cal.4th at pp. 665, 670 [prosecutor's use of hypothetical in closing argument explaining concept of reasonable doubt using outline of shape of California with incomplete and inaccurate information constituted misconduct because it was not supported by evidence and was misleading].)

*B. Governing Law on Self-defense*

A defendant acts in lawful self-defense if (1) he reasonably believed he was in imminent danger of suffering bodily injury; (2) he reasonably believed the immediate use of force was necessary to defend against that danger; and (3) he used no more force than was reasonably necessary to defend against that danger. (*People v. Hernandez* (2011) 51 Cal.4th 733, 747; *People v. Clark* (2011) 201 Cal.App.4th 235, 250.) "[T]he defendant must actually and reasonably believe in the need to defend." (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082; accord, *People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732, 744 [defendant must "actually and reasonably believe[]" the use of force was necessary].)

"To assess whether a belief was objectively reasonable, 'a jury must consider what "would appear to be necessary to a reasonable person in a similar situation and with similar knowledge."' [Citation.] It must assume "the point of view of a



reasonable person in the position of [the] defendant,” taking into account “all the elements in the case which might be expected to operate on his mind.”” (*People v. Brady* (2018) 22 Cal.App.5th 1008, 1014; accord, *People v. Humphrey, supra*, 13 Cal.4th at p. 1082.) It is a question for the jury whether a defendant’s use of force was “greater than that reasonable under the circumstances.” (*People v. Casares* (2016) 62 Cal.4th 808, 846 (*Casares*), disapproved on other grounds in *People v. Dalton* (2019) 7 Cal.5th 166, 214.)

“[D]eadly force or force likely to cause great bodily injury may be used only to repel an attack which is in itself deadly or likely to cause great bodily injury . . . .” (*People v. Hardin* (2000) 85 Cal.App.4th 625, 629-630; see *People v. Pinholster* (1992) 1 Cal.4th 865, 966 [“right of self-defense did not provide defendant with any justification or excuse for using deadly force to repel a nonlethal attack”], disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.) The burden is on the prosecution to prove that the use of force was not in lawful self-defense. (*People v. Tully* (2012) 54 Cal.4th 952, 1028; accord, *People v. Lloyd* (2015) 236 Cal.App.4th 49, 63 (*Lloyd*) [“It ultimately is the prosecution’s burden to prove the absence of justification beyond a reasonable doubt.”].)

C. *The Prosecutor Did Not Commit Prosecutorial Misconduct*

Brady contends the prosecutor committed prejudicial misconduct by misstating the law on self-defense in violation of state law and Brady’s federal right to due process. This contention lacks merit.

As Brady points out, the use of hands alone can be sufficient to support a conviction of assault by means of force likely to produce great bodily injury. (*People v. Aguilar* (1997)

16 Cal.4th 1023, 1028; *People v. Wingo* (1975) 14 Cal.3d 169, 176.) Thus, the jury could have found Brady's use of a knife in response to Alex's attack was in lawful self-defense if it found Alex's attack was likely to cause great bodily injury, as long as it found the other elements of self-defense were also present. (*People v. Hardin, supra*, 85 Cal.App.4th at p. 630.)

The prosecutor's argument in context did not misstate this law. She argued Brady's belief he had to use deadly force in response to Alex's attack was unreasonable, describing the incident as one where Brady was "essentially . . . bringing a knife to a fist fight." She added that the fight was initially between two females using their fists and feet, with no weapons, and then Brady acted unreasonably when he "introduces the knife into the situation. And so he escalates what was a fist fight to now a deadly confrontation." A reasonable interpretation of this argument is that Brady was not facing a risk of great bodily injury or death from his fighting with the two women or Alex's use of his fists to punch Brady sufficient to justify Brady's use of a knife. A reasonable juror would not interpret this argument to mean a defendant could never use a knife in response to an attacker who only used his hands.

Brady's reliance on *Lloyd, supra*, 236 Cal.App.4th 49 is misplaced. There, the prosecutor argued, "If you find there is self-defense, you are saying . . . the defendant's conduct was absolutely acceptable." (*Id.* at p. 62.) As the court explained, this was a misstatement of the law because the defendant did not need to show "self[-]defense was true," but rather, that "the evidence [was] sufficient to raise a reasonable doubt as to whether the defendant was justified . . . ." (*Ibid.*) The prosecutor also argued, "Well, what does not guilty mean? It means you didn't commit a crime." (*Ibid.*) The court found this

too was a misstatement of law that reduced the prosecution's burden of proof, explaining, "A not guilty verdict is not the equivalent of finding the defendant innocent." (*Ibid.*) By contrast, as discussed, the prosecutor here argued Brady was not justified in bringing a knife to the fight under the circumstances, not that a defendant could never claim self-defense when using a knife to respond to an attacker's fists.

### **DISPOSITION**

The judgment is affirmed.

FEUER, J.

We concur:

SEGAL, Acting P. J.

DILLON, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.